FILED

D 931565 APR 5 1994

OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1993

STATE OF LOUISIANA
DEPARTMENT OF TRANSPORTATION
AND DEVELOPMENT
PETITIONER

VERSUS

ANTHONY R. WIEDEMAN, JR.
DERYL A. FALCON
ROGER AND MONA CONNER
DIXIE ELECTRIC MEMBERSHIP CORPORATION
MARK A. COSTON
ALLSTATE INSURANCE COMPANY
CANANDAIGUA WINE COOLER COMPANY, INC.
RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

PETITION FOR A WRIT OF CERTIORARI

Of Counsel:

Richard P. Ieyoub
Attorney General
State of Louisiana

John Claiborne Young
Assistant Attorney General
Louisiana Department of Justice

Lawrence A. Durant
General Counsel
Louisiana Department of Transportation & Development

Terry J. Manuel
Special Assistant Attorney General

RONALD A. SEALE
SPECIAL ASSISTANT ATTORNEY GENERAL
SEALE, SMITH, ZUBER & BARNETTE
8550 UNITED PLAZA BLVD.
SUITE 200
BATON ROUGE, LA 70809
TELEPHONE: (504) 924-1600

COUNSEL OF RECORD

APRIL 5, 1994

Franklin Press, Inc. Baton Rouge, Louisiana

48 pp

QUESTION PRESENTED FOR REVIEW

Whether the Supreme Court of Louisiana erred in its restrictive interpretation of 23 U.S.C. § 409 in holding that the statute protects only compilations while excluding reports and raw data gathered for or incorporated into such compilations?

PARTIES TO THE PROCEEDING

The parties to these proceedings are:

Anthony R. Wiedeman
Deryl A. Falcon
Dixie Electric Membership Corporation
State of Louisiana, Department of Transportation and Development
Mark A. Coston
Allstate Insurance Company
Canandaigua Wine Cooler Company, Inc.
Roger and Mona Conner

This application for a writ of certiorari is filed upon the behalf of the State of Louisiana thus Rule 29.1 with respect to corporations is inapplicable.

TABLE OF CONTENTS

PAGE

Question Presented for Review i

Parties to the Proceeding ii

Table of Authorities iv

Opinions Below 1

Statement of Jurisdiction 2

Pertinent Statutes 2

Statement of the Case 4

Reasons for Granting the Petition 7

Conclusion 18

Appendix ..... A-i

TABLE OF AUTHORITIES

CASES **PAGE**

Claspill v. Missouri Pacific Railroad Co.,
793 S.W. 2d 139 (Mo. 1990) 12

Federal Bureau of Investigation v. Abramson,
456 U.S. 626, 102 S. Ct. 2054,
72 L.Ed. 2d 376 (1982) 17

Hagerty v. Southern Railway Company,
133 F.R.D. 34 (U.S.D.C. Mo. 1990) 13

Harrison v. Burlington Northern Railroad Company,
965 F. 2d 155 (7th Cir. 1992) 11

John Doe Agency v. John Doe Corp, 493 U.S.
146, 100 S. Ct. 471, 107 L.Ed 2d 462 (1989) 15

Lusby v. Union Pacific Railroad Company,
4 F.3d 639 (8th Cir. 1993) 11

Martinolich v. Southern Pacific Transportation,
532 So. 2d 435 (La. App. 1st Cir.) 8

Perkins v. Ohio Department of Transportation,
584 N.E. 2d 794 (Oh. App. 10th District 1989) 13

Robertson v. Union Pacific Railroad Company,
954 F. 2d 1433 (8th Cir. 1992) 10

Sawyer v. Illinois Central Gulf Railroad,
606 So. 2d 1069 (Ms. 1992) 11

Southern Pacific Transportation Company v. Yarnell,
176 Az. 552, 863, P. 2d 271 (1994) 13

STATUTES

23 U.S.C. § 409 2

23 U.S.C. § 152 2

5 U.S.C. § 552 16

No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term 1993

STATE OF LOUISIANA
DEPARTMENT OF TRANSPORTATION
AND DEVELOPMENT
PETITIONER

VERSUS

ANTHONY R. WIEDEMAN, JR.
DERYL A. FALCON
ROGER AND MONA CONNER
DIXIE ELECTRIC MEMBERSHIP CORPORATION
MARK A. COSTON
ALLSTATE INSURANCE COMPANY
CANANDAIGUA WINE COOLER COMPANY, INC.
RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The decision of the Supreme Court of Louisiana is reported at 627 So. 2d 170 (La. 1994). The judgment of the Louisiana First Circuit Court of Appeal denying writs is reported at 620 So. 2d 855 (La. App. 1st Cir. 1993). The ruling of the Twenty-First Judicial District Court for the Parish of Livingston, State of Louisiana, is not reported.

STATEMENT OF JURISDICTION

The decision of the Supreme Court of Louisiana was rendered on November 29, 1993. A petition for rehearing was denied on January 6, 1994. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

PERTINENT STATUTES

23 U.S.C. § 409:

> "Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data."

23 U.S.C. § 152:

> "(a) Each State shall conduct and systematically maintain an engineering survey of all public roads to identify hazardous locations, sections, and elements, including roadside obstacles and unmarked or poorly marked roads, which may constitute a danger to motorists and pedestrians, assign priorities for the correction of such locations, sections, and elements, and establish and implement a schedule of projects for their improvement.
>
> (b) The Secretary may approve as a project under this section any highway safety improvement project.

(c) Funds authorized to carry out this section shall be available for expenditure on any public road (other than a highway on the Interstate System).

(d) Funds authorized to be appropriated to carry out this section shall be apportioned to the States as provided in section 402(c) of this title. Such funds shall be available for obligation in the same manner and to the same extent as if such funds were apportioned under section 104(b)(1), except that the Secretary is authorized to waive provisions he deems inconsistent with the purposes of this section.

(f) Each State shall establish an evaluation process approved by the Secretary, to analyze and assess results achieved by highway safety improvement projects carried out in accordance with procedures and criteria established by this section. Such evaluation process shall develop cost-benefit data for various types of corrections and treatments which shall be used in setting priorities for highway safety improvement projects.

(g) Each State shall report to the Secretary of Transportation not later than December 30 of each year, on the progress being made to implement highway safety improvement projects for hazard elimination and the effectiveness of such improvements. Each State report shall contain an assessment of the cost of, and safety benefits derived from, the various means and methods used to mitigate or eliminate hazards and the previous and subsequent accident experience at these locations. The Secretary of Transportation shall submit a report to the Committee on Environment and Public Works of the Senate and the Committee on Public Works and Transportation of the House of Representatives not later than April 1 of each year on the progress being made by the States in implementing the hazard elimination program (including but not limited to any projects for pavement marking). The report shall include, but not be limited to,

the number of projects undertaken, their distribution by cost range, road system, means and methods used, and the previous and subsequent accident experience at improved locations. In addition, the Secretary's report shall analyze and evaluate each State program, identify any State found not to be in compliance with the schedule of improvements required by subsection (a) and include recommendations for future implementation of the hazard elimination program.

(h) For the purposes of this section the term "State" shall have the meaning given it in section 401 of this title.

STATEMENT OF THE CASE

This action arises out of a motor vehicle accident occurring in Livingston Parish, Louisiana, on February 7, 1991, at the intersection of Louisiana Highways 64 and 1019. Plaintiffs, Anthony R. Wiedeman and Deryl A. Falcon, were riding a motorcycle westbound on Highway 64 and collided with a pickup truck owned by Dixie Electric Membership Corporation (DEMCO) and operated by Mark A. Coston, a DEMCO employee.

The accident occurred as Mr. Coston, eastbound on Highway 64, attempted a left-hand turn onto Highway 1019 northbound. It is disputed whether or not the motorcycle crossed the center line of Highway 64 into the eastbound lane of travel thus striking the DEMCO vehicle or, alternatively, whether Coston turned into the path of the oncoming motorcycle.

In the course of discovery, plaintiffs propounded a number of interrogatories and requests for production of documents to the Louisiana Department of Transportation and Development (DOTD) seeking to discover, among other things, all records

within the possession of DOTD reflecting previous traffic accidents at the intersection in question for a five year period, together with the actual police accident investigation reports for said accidents, average daily traffic counts, annual inspection and maintenance reports, and other miscellaneous design criteria. Additionally, plaintiffs sought copies of all lawsuits naming DOTD which involved accidents at the intersection in question.

DOTD objected, claiming the information sought to be within the protection of 23 U.S.C. § 409, specifically those records maintained by DOTD tracking the number of motor vehicle accidents at the intersection in question. DOTD argued said records are maintained solely for the purpose of identification and prioritization of intersections for modification which would be accomplished utilizing federal highway funds and pursuant to Title 23 of the United States Code.

Plaintiff moved to compel responses. The matter came on for hearing in the state trial court on December 7, 1992. At the hearing, a DOTD engineer, Maurice Jordan, testified that the information at issue would be used by the Department to identify high-risk intersections for possible improvement and should a modification be made, federal funding would be utilized. Mr. Jordan further testified, however, that no immediate plans for improvement of the intersection of Louisiana Highways 64 and 1019 were anticipated.

The trial judge ordered the production of much of the documents and information sought by plaintiff.

On February 26, 1993, DOTD applied for a writ to the First Circuit, Court of Appeal of Louisiana, which declined to exercise its supervisory jurisdiction. Subsequently, DOTD filed a

writ application to the Supreme Court of Louisiana as did the plaintiffs. On July 1, 1993, the Supreme Court granted both writs and consolidated the cases with *Roger and Mona Conner vs. Larry W. Laird, et al,* a case involving an intersectional collision in Lake Charles, Louisiana. In that matter, plaintiff sought to discover accident investigation reports for the intersection at issue and DOTD filed a motion *in limine* to exclude the same. The trial court granted DOTD's motion and plaintiff sought relief from Louisiana's Third Circuit Court of Appeal which denied the writ. Plaintiff thereafter sought a writ from the Louisiana Supreme Court which was granted and consolidated with *Wiedeman/Falcon* for oral argument. The cases were argued on October 19, 1993. On November 29, 1993, the Supreme Court issued its opinion ordering, in part, the production of documents as sought by plaintiffs. An application for rehearing by DOTD was denied on January 6, 1994, as was an application to stay the enforcement of the judgment on January 12, 1994.

On January 18, 1994, DOTD applied to Mr. Justice Antonin Scalia for a stay of the judgment of the Louisiana court pursuant to 28 U.S.C. § 2101(f) and Rule 23 of the Supreme Court. DOTD sought to stay the judgment of the Louisiana Supreme Court pending the filing of this writ application. The stay was denied on January 22, 1994.

The State of Louisiana, through the Department of Transportation and Development, has produced the information and documentation as ordered by the Louisiana court in *Wiedeman* and is now before this Honorable Court on writ application to address the claimed erroneous interpretation of federal law by the Supreme Court of Louisiana.

REASONS FOR GRANTING THE PETITION

The decision of the Supreme Court of Louisiana below represents an erroneous interpretation of federal law, 23 U.S.C. § 409, and conflicts with the opinions of other state and federal decisions interpreting the same statute. Moreover, Section 409 of Title 23 of the United States Code has been the subject of conflicting interpretations throughout the nation and direction is needed from this Honorable Court to ensure uniform and consistent application of the statute which, due to its preemptive nature, has a significant impact on civil litigation in state as well as federal tribunals.

A uniform application is particularly critical to those concerns, railroads for example, conducting operations in many jurisdictions and now subject to different interpretations of a single federal statute depending on the forum.

Unless and until this Court addresses the application of 23 U.S.C. § 409, the issues here presented will remain unsettled and will be the subject of diverse judicial interpretation throughout the United States.

The Highway Safety Act of 1973 is codified in 23 U.S.C. § 101, *et seq.* and provides for the acceleration and the construction of federal aid highway systems recognizing that many of these existing highways are inadequate to meet the needs of local and interstate commerce.

In connection with the implementation of the Act, and to secure federal funding for highway improvements, states have numerous responsibilities with respect to highway safety improvement programs including the identification, evaluation, planning, and implementation of projects in order to enhance the safety of potential accident sites within their respective jurisdictions.

As noted by the *Wiedeman* Court:

> Title 23 forms a part of a comprehensive plan to promote highway safety and to facilitate candor in the administration of highway safety standards. 627 So. 2d 170 at 173.

In order to foster the free flow of safety related information and to encourage candor, Congress enacted Section 409 which, in its earlier form, protected the admissibility of documentation generated by the states in compliance with Title 23.

An early test of Section 409 came from Louisiana in *Martinolich v. Southern Pacific Transportation,* 532 So. 2d 435 (La. App. 1st Cir.); writ denied, 535 So. 2d 745 (1988), where a Louisiana intermediate appellate court recognized the preemptive nature of the federal statute vis-a-vis state discovery rules but further noted the statute spoke only to admissibility rather than to discoverability.

In 1991, and subsequent to *Martinolich,* Congress amended Section 409 specifically to preclude the discovery of any information previously protected only from admissibility. Effective December 18, 1991, the statute now reads:

> "Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds **shall not be subject to discovery** or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or

> addressed in such reports, surveys, schedules, lists, or data." (Emphasis added)

The *Wiedeman* court, in an attempt to strictly and narrowly construe this preemptive statute, nevertheless transcends the bounds of statutory construction with an aberrant result.

The Louisiana Court effectively eviscerates Section 409 in restricting its scope to information which has been compiled "for certain purposes" 627 So. 2d 170 at 173 while yet permitting the discovery of the data collected by the Department in compliance with Title 23.

The Court noted:

> The word "compiled" indicates that information is collected into one document or composed from other sources. [*See Webster's New Collegiate Dictionary* p. 230, (1977).] The term suggests an end product, something more than unedited factual material. 627 So. 2d 170 at 173, (La. 1993).

Essentially, therefore, Louisiana's Court limits the protection of Section 409 to the ultimate end product rather than the entirety of the efforts of the State to comply with Title 23 in its identification, evaluation, planning and implementation of projects in order to enhance the safety of potential accident sites. The error of the Court is crystallized in the following language:

> Section 409 creates a privilege for compilations enumerated in the statute, but the privilege does not extend to reports and data gathered for or incorporated into such compilations. 627 So. 2d 170 at 173.

This is an erroneous result particularly to the extent that data gathered specifically for the purpose of evaluation and prioritization pursuant to Title 23 is excluded from the

umbrella of protection. It is particularly egregious when Louisiana's Department of Transportation and Development has no other reason to receive and compile such information other than for the purposes of compliance with Title 23.

Thus, the inquiry is, "at what point in the evaluation process by a state of its roads, bridges and highways in compliance with Title 23 does Section 409 come into play?" When is it reasonable to assume that the process of evaluation and identification of hazardous sites will be protected under the mandate from Congress in Section 409?

To permit a plaintiff to discover data accumulated by the state, arguably not yet compiled into a single report, and thereafter to use said data in an attempt to prove notice of a dangerous condition at an intersection completely thwarts the intent of Section 409 in particular and, to a great degree, the purposes of Title 23 in its entirety. Such is the result of *Wiedeman* which is not in keeping with the weight of authority on this issue.

In *Robertson vs. Union Pacific Railroad Company,* 954 F. 2d 1433 (8th Cir. 1992), the United States Eighth Circuit Court of Appeal affirmed the exclusion of traffic counts, as well as a newspaper article addressing the dangerous nature of the railroad crossing at issue together with a formula used by the Arkansas Highway Department to evaluate railroad crossings in its state. The Court rejected plaintiff's contention that the data involved was beyond the protection of Section 409 as some of it may not have been collected or utilized solely for Title 23 purposes. Speaking to the issue of the introduction of data, the Eighth Circuit observed:

> The railroad asserts that the district court properly excluded the newspaper article from evidence, because

> "[t]o allow the introduction of the data through the newspaper article would circumvent the purpose of the statute." We agree. Appellants are not entitled to introduce evidence of otherwise inadmissible data simply because it is reported by an indirect secondary source. 23 U.S.C. § 409 provides a fairly broad exclusion: "reports, surveys, schedules, lists [and] data" compiled for safety enhancement purposes. 954 F. 2d 1433, 1435 (8th Cir. 1992).

In accord is *Lusby v. Union Pacific Railroad Company,* 4 F.3d 639 (8th Cir. 1993). *Wiedeman* is clearly contra to the United States Eighth Circuit as the Louisiana Court specifically ordered the production of traffic counts as well as other raw data.

In accord with the Eighth Circuit but at issue with *Wiedeman* is the United States Seventh Circuit in *Harrison vs. Burlington Northern Railroad Company,* 965 F. 2d 155 (7th Cir. 1992), in which the Court upheld the exclusion of a letter from the Illinois Commerce Commission to a railroad detailing the results of a report otherwise inadmissible.

The courts of last resort of Louisiana and Mississippi are not in accord. In *Sawyer v. Illinois Central Gulf Railroad,* 606 So. 2d 1069 (Ms. 1992), the Mississippi high court adopts a liberal interpretation more in accord with the U.S. Eighth and Seventh Circuits.

Before the *Sawyer* court on questions of admissibility were not only the hazard rank inventory of Mississippi relative to highway crossings but a letter detailing the dangers of the railroad crossing prepared some two years prior to the accident in question.

In excluding the inventory, the letter, as well as testimony concerning the same, the court noted:

Context is all important. A number of years ago, the federal government developed a program for enhancing the safety of railroad crossings across the country. The states were encouraged to participate under federal guidelines and upon compliance would receive ninety percent federal funding for such upgrade projects. Federal law and regulations directed the states to survey their circumstances and prepare data on crossings where safety improvements may be needed. To the end that candor might obtain regarding hazards that exist, the Congress acted to protect information developed in connection with the program from use in any civil litigation arising out of railroad crossing accidents. 606 So. 2d 1069 at 1073.

Further, *Sawyer* recorded:

Section 409 is one of the laws of the United States by which all judges of this state and the courts they serve are bound, notwithstanding anything in the constitution and laws of this state, having to do with rule making power, inherent authority, *Newell v. State,* or anything else.

Besides, nobody made Mississippi get into the railroad crossing safety enhancement program. It is a voluntary program. Duly authorized officials of this state, however, have committed us to the program - in exchange for ninety percent federal funding - and it does not strike us outrageous that we should accede to the federal government's rules and regulations appertaining thereto. We have it on good authority that Missouri and Louisiana have rejected challenges to Section 409. *See Claspill v. Missouri Pacific Railroad Co.,* 793 S.W. 2d 139 (Mo. 1990); *Martinolich v. Southern Pacific Transportation Co.*, 532 So. 2d 435 (La. Ct. App. 1988). We accept Section 409 as controlling, as well. 606 So. 2d 1069 at 1073-1074.

Other jurisdictions are in accord. From Missouri is *Claspill v. Missouri Pacific Railroad Co.,* 793 S.W. 2d 139 (Mo.

1990), wherein the Supreme Court of Missouri excluded testimony of engineers concerning data compiled by the Public Service Commission and the Highway and Transportation Department in Missouri finding the testimony to be based upon documentation otherwise protected by Section 409.

A pre-amendment case, *Perkins v. Ohio Department of Transportation*, 584 N.E. 2d 794 (Oh. App. 10th District 1989), prohibits the admission of evidence of any accident which came to the attention of the Ohio Highway Department solely as the result of its programs operated pursuant to a federal hazard elimination program.

Another Missouri case, from the federal court, takes a broader approach than does *Wiedeman* in precluding the introduction of letters, correspondence, or internal memoranda relative to certain improvements or modifications at railroad grade crossings as being within the scope of Section 409. *See Hagerty v. Southern Railway Company*, 133 F.R.D. 34 (U.S.D.C., Mo. 1990).

A recent case from Arizona specifically addresses the issue of the protection of raw data versus compilations. In *Southern Pacific Transportation Company v. Yarnell*, 176 Az. 552, 863 P. 2d 271 (1994), the court held:

> The real parties in interest assert that "data" does not mean facts or raw data, but only means the written documents into which the data has been incorporated. That contention contradicts the plain language used by Congress. As the real parties in interest conceded at oral argument, "We're not reading the statute as it's written."
>
> Any other interpretation would render the statutory privilege illusory. Physical documents which contained data would be protected, but the data itself would not.

Any other meaning would also undercut the statutory purpose. Congress apparently intended to protect the process of making rail crossing safety decisions from outside scrutiny and interference. [FN2] With countless miles of rail lines and highways throughout the United States but only finite resources, improving safety is necessarily an ongoing process. Not every safety measure can be adopted at every rail crossing with a snap of the fingers. Congress thought that decision seeking to optimize the proper balance between safety and fiscal restraints would be best produced in a system free from intrusive second-guessing by civil tort actions, a system in which candid evaluations of highway safety hazards would flourish and information-gathering would be uninhibited. *Robertson v. Union Pacific R.R. Co.*, 954 F. 2d 1433, 1435 (8th Cir. 1992) (evaluations); *Perkins v. Ohio Dep't of Transp.*, 65 Ohio App. 3d 487, 584 N.E. 2d 794, 802 (1989) (information); *Sawyer v. Illinois Cent. Gulf R.R. Co.*, 606 So. 2d 1069, 1074 (Ms. 1992) (information).

*3 [2] [3] The clear weight of authority holds that data as well as documents are protected by the statute. In *Robertson v. Union Pac.*, the court upheld the exclusion [FN3] of rail crossing safety data, of a newspaper article based on such data, and of expert opinion testimony based on such data. The court held that introduction of data compiled for the purpose of highway and rail crossing safety enhancement was barred by "[t]he plain language of the statute." 954 F. 2d at 1435. Moreover, the statute also bars secondary sources—such as the newspaper article—because " '[t]o allow the introduction of the data through the newspaper article would circumvent the purpose of the statute.' " *Id.* (quoting district court). In short, both the documents containing data and the data itself are protected. 863 P. 2d, 271 at 274.

Finally, the *Yarnell* court noted:

The real parties in interest also contend that the data is discoverable because it might have been gathered for purposes other than federal safety programs. The record fails to reveal that the data was gathered for other purposes. More importantly, that fact would be immaterial even if it could be proved: The federal statutory language and purpose would still require that the data be privileged. In *Robertson v. Union Pac.*, 954 F. 2d at 1435 n. 3, the court held just such an argument to be "without merit."

The real parties in interest next argue that the statute does not protect data produced prior to the effective date of the 1991 amendment. Prior to that date, they contend, the statute barred admission of the data into evidence at trial but not its pretrial discovery. *See Martinolich*, 532 So. 2d at 439.

We reject this contention first because Congress intended all along to protect the data from discovery. The earlier version of the statute barred not only the admission of the data into evidence, but also its consideration "for other purposes." In our opinion, *Martinolich* misinterpreted the statute; the Congressional amendment clarified that the provision already extended the privilege to discovery materials rather than altering the privilege by expanding its scope. 863 P. 2d 271 at 275-276.

Although this Honorable Court has not yet addressed the definition of "compilation" in the context of a Section 409 case, we believe the issue is closely analogous to those Freedom of Information Act cases wherein this Court has been faced with a similar issue.

In *John Doe Agency v. John Doe Corp*, 493 U.S. 146, 100 S. Ct. 471, 107 L. Ed 2d 462 (1989), the United States Supreme Court faced the issue of the meaning of the term "compilation" with respect to the production of documents in

the context of a dispute arising out of the Freedom of Information Act, 5 U.S.C. § 552 and particularly the extent of (b) (7) (A) under the Act which precludes accessibility to documents compiled for law enforcement purposes.

While recognizing the purpose of the FOIA is to promote the free exchange of information, this Court nevertheless declined to narrowly construe 7(A) to exempt only those documents specifically prepared for a single purpose.

Writing for the Court, Mr. Justice Blackmun notes:

> The Court of Appeals, however, throughout its opinion would have the word "compiled" mean "originally compiled." See 850 F. 2d, at 109. We disagree with that interpretation for, in our view, the plain meaning of the word "compile," or, for that matter, of its adjectival form "compiled," does not permit such refinement. This Court itself has used the word "compiled" naturally to refer even to the process of gathering at one time records and information that were generated on an earlier occasion and for a different purpose. See *FBI v. Abramson*, 456 U.S. at 622, n.5, 102 S. Ct. at 2060, n.5; Reporters Committee, *supra.*
>
> Respondent, too, has used the word "compile" in its ordinary sense to refer to the assembling of documents, even though those documents were put together at an earlier time for a different purpose. In its FOIA requests of September 30, 1986, and February 3, 1987, respondent asked that the requested materials be furnished as soon as they were available, and that the response to the request "not await a compilation of all the materials requested." App. 21, 47-48. This was a recognition, twice repeated, that the documents having been compiled once for the purpose of routine audits were not disqualified from being "compiled" again later for a different purpose.
>
> We thus do not accept the distinction the Court of

> Appeals drew between documents that originally were assembled for law-enforcement purposes and those that were not so originally assembled but were gathered later for such purposes. The plain language of Exemption 7 does not permit such a distinction. Under the statute, documents need only to have been compiled when the response to the FOIA request must be made. 110 St. Ct. at pp. 476-477 (footnotes omitted).

As noted in the *Federal Bureau of Investigation v. Abramson,* 456 U.S. 626, 102 S. Ct. 2054, 72 L.Ed 2d 376 (1982), the term compilation has likewise been used to refer even to the process of data gathering. The Court in that case, also considering Exemption 7 of FOIA, held that information which was originally compiled for law enforcement purposes did not lose its Exemption 7 protection if summarized in a new document not created for law enforcement purposes.

A narrow construction of 23 U.S.C. § 409 so as to permit discovery of all documentation collected and compiled by DOTD, albeit not in a final survey or prioritization of hazardous roadways is not in keeping with the intent of the statute; to promote highway improvement and, thus enhance public safety by precluding the possibility that such information later would be available to litigants in civil suits. *Perkins v. Ohio Department of Transportation, supra.*

CONCLUSION

We believe the issues here presented deserve consideration by this Court pursuant to Rule 10.1 (b), and (c). Section 409 of Title 23 remains the subject of confusion and inconsistent result and for the reasons as set forth herein it is respectfully requested and prayed that this Honorable Court review the decision of the Louisiana Supreme Court below.

Respectfully Submitted:

SEALE, SMITH, ZUBER & BARNETTE

BY: _____

RONALD A. SEALE
SPECIAL ASSISTANT ATTORNEY GENERAL
8550 United Plaza Boulevard
Suite 200
Baton Rouge, LA 70809
Telephone: (504) 924-1600

Counsel of Record

Of Counsel:
RICHARD P. IEYOUB
ATTORNEY GENERAL
State of Louisiana

JOHN CLAIBORNE YOUNG
ASSISTANT ATTORNEY GENERAL
Louisiana Department of Justice

LAWRENCE A. DURANT
GENERAL COUNSEL
Louisiana Department of Transportation & Development

TERRY J. MANUEL
SPECIAL ASSISTANT ATTORNEY GENERAL

April 5, 1994

APPENDIX

PAGE

A. Opinion of Louisiana Supreme Court A-1

B. Denial of Supreme Court for application for rehearing A-9

C. Denial of Louisiana Supreme Court for stay of judgment pending filing of petition for Writ of Certiorari to United States Supreme Court A-14

D. Denial of United States Supreme Court for stay pending filing of writ A-16

E. Denial of Application for Writ of Certiorari by Louisiana First Circuit Court of Appeal A-17

F. Written opinion and judgment by the Honorable Robert Morrison, 21st Judicial District Court, Parish of Livingston, State of Louisiana A-18

APPENDIX A

NOV. 29, 1993

SUPREME COURT OF LOUISIANA

NO. 93-CC-1314

ANTHONY R. WIEDEMAN, JR.

versus

DIXIE ELECTRIC MEMBERSHIP CORPORATION, ET AL

c/w NO. 93-CC-1318

DERYL A. FALCON

versus

DIXIE ELECTRIC MEMBERSHIP CORPORATION

c/w NO. 93-CC-1352

ROGER CONNER AND MONA CONNER

versus

LARRY W. LAIRD, ET AL

ON WRIT OF REVIEW TO THE COURTS OF APPEAL, FIRST AND THIRD CIRCUITS, STATE OF LOUISIANA

WATSON, Justice.[1]

In these consolidated cases, three plaintiffs injured in two motor vehicle accidents brought suit against the Department of Transportation and Development [DOTD]. At issue is interpretation of a federal statute, 23 U.S.C. § 409, which bars discovery and introduction into evidence of highway safety information compiled by the State.

---

[1]Pursuant to Rule IV, Part 2, § 3, Calogero, C.J. was not on the panel which heard and decided this case. See the footnote in *State v. Barras*, 615 So.2d 285 (La. 1993).

FACTS

On May 23, 1989, Roger Conner's automobile struck a turning vehicle at the intersection of Gauthier Road and Lake Street in Lake Charles, Louisiana. Conner was severely injured and brought suit alleging, *inter alia,* that the intersection posed an unreasonable danger to motorists. During discovery, Conner obtained from DOTD traffic flow studies, traffic counts, accident reports and other reports and evaluations concerning the accident site. Conner sought to use the traffic studies and accident reports to show that the intersection warranted a four-way stop sign or signal because of traffic volume and accident frequency. The DOTD filed a motion *in limine* objecting to the documents' introduction into evidence. The trial court excluded the evidence pursuant to 23 U.S.C. § 409 which provides:

> Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144 and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or state court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such report, surveys, schedules, lists, or data.

As originally enacted in 1987, § 409 addressed only *admissibility* of evidence. In 1991, Congress amended the statute to preclude *discovery* as well. 23 U.S.C.A. § 409 (West Supp. 1993) (effective December 18, 1991).

In a Livingston Parish intersectional collision on February 7, 1991, Anthony R. Wiedeman and Deryl A. Falcon were injured when a left-turning vehicle struck their motorcycle at the intersection of Louisiana Highways 64 and 1019. They sued DOTD, claiming that the intersection was defectively designed or, alternatively, inadequately signed or signaled. Plaintiffs propounded a number of interrogatories and requests for production to DOTD, seeking to discover, among other things, all records within DOTD's possession reflecting previous train accidents at the site for a five-year period, accident reports, other records relating to the scene in question, average daily traffic counts and miscellaneous design criteria. DOTD made a § 409 objection and also objected to several requests as unduly broad and burdensome.

Plaintiffs filed a motion to compel. The trial court ruled that § 409 only protects information compiled specifically for use in a planned or pending highway improvement project. Since a DOTD witness testified that there were no specific plans to improve or reconstruct the intersection at issue, DOTD had to comply with the majority of plaintiffs' requests. The court held that DOTD need not respond to several interrogatories and requests for production of documents which delved into planned improvements at other intersections.

The courts of appeal denied writs in each case. All parties applied for supervisory writs, which were granted to address § 409's effect on Louisiana civil procedure.

LAW

Plaintiffs argue that disposition of this dispute should be determined solely by state law. Louisiana Code of Civil Procedure Articles 1422 through 1425 govern the scope of

discovery for Louisiana civil trials. In general, parties may discover any relevant, nonprivileged material, which is either admissible or reasonably calculated to lead to admissible evidence. LSA C.C.P. art. 1422. For admissibility, evidence must be relevant and not excluded by other positive law. LSA C.E. art. 402. Plaintiffs assert that the information at issue is relevant and admissible to show the dangerous condition of the accident sites and to show actual or constructive knowledge on the part of DOTD. *Dill v. DOTD,* 545 So.2d 994, 996 (La. 1989); *Lee v. Missouri Pacific R. R. Co.,* 540 So.2d 287, 292 (La. 1989).

Despite the State's substantial interest, § 409's explicit preemptive language overrides conflicting state law by virtue of the Supremacy Clause. U.S. Const. art VI, cl. 2; *Jones v. Rath Packing Co.,* 430 U.S. 519, 525, 97 S.Ct. 1305, 1309, 51 L.Ed.2d 604, 613 (1977). Section 409 controls. *Beecher v. Keel,* 607 So.2d 549 (La. 1992). See also *Clasphill v. Missouri Pacific Railroad Company,* 793 S.W.2d 139,140 (Mo.banc 1990).

Since preemption is never presumed, § 409 must be construed restrictively to prohibit only what is expressly proscribed. *Rath Packing Co.,* 430 U.S. at 525. Nevertheless, DOTD correctly asserts that the *Wiedeman* trial court unduly limited the statute's scope. While the trial court correctly interpreted the latter part of § 409 as protecting documents involving an actual construction project, the court failed to consider the remaining documents shielded by § 409, namely, those compiled "pursuant to sections 130, 144, and section 152 of this title." These three sections impose certain inves-

tigative and reporting requirements on states participating in federal highway aid programs.

23 U.S.C. § 130 requires that participating states "conduct a survey of all highways" to identify hazardous railroad crossings, and "establish and implement a schedule" of corrective projects. 23 U.S.C. § 144 requires that states "make application to the Secretary for assistance in replacing or rehabilitating . . . highway bridge[s]" which are eligible for aid under a priority system established in cooperation with the Secretary.

Section 152, relative to highway improvements, requires that participating states "maintain an engineering *survey* . . . assign *priorities* . . . and implement a *schedule* of projects." It mandates "an evaluation process . . . which shall develop *cost-benefit data.*" Finally, states must "*report* to the Secretary of Transportation" on an annual basis. 23 U.S.C. § 152 (emphasis added). Section 409 incorporates § 152 (by reference) and protects the compiled documents from use in civil trials. *Beecher,* 607 So.2d at 549. Thus, in addition to determining whether an item of evidence was compiled "for the purpose of developing any highway safety improvement project," the trial court must decide whether the item is one of those enumerated in § 152.

DOTD argues for an even more expansive interpretation that would protect data and raw facts as well as the written documents incorporating the data. DOTD essentially asks this Court to transform a statute, which by its literal wording protects information *compiled* for certain purposes, into one which protects all information in DOTD's possession. We refuse. The word "compiled" indicates that information is collected into one document or composed from other sources.

[*See Webster's New Collegiate Dictionary* p. 230, (1977).] The term suggests an end product, something more than unedited factual material. Moreover, privileges derogate from the system by which courts determine the truth and should not be expansively construed. *United States v. Nixon,* 418 U.S. 683, 709, 94 S.Ct. 3090, 3108, 41 L.Ed.2d 1039, 1065 (1974). Section 409 creates a privilege for compilations enumerated in the statute, but the privilege does not extend to reports and data gathered for or incorporated into such compilations.

In so holding we are mindful that § 409 forms part of a comprehensive federal plan to promote highway safety. See 23 U.S.C. § 402. Little can be gleaned from the statute's sparse legislative history [*see* H.Conf.Rep. No. 100-27, *reprinted* in 1987 U.S.Code Cong. & Admin. News 66, 156-157], but one court has reasonably concluded that § 409 was enacted "to facilitate candor in administrative evaluations of highway safety hazards." *Duncan v. Union Pacific Railroad Co.*, 790 P.2d 595, 597 (Utah App. 1990). A rule which requires DOTD to divulge source data but not the end product fosters candor by shielding the state's self-critical evaluations and conclusions from outside scrutiny. It also accords with Louisiana's strong interest in fully and fairly adjudicating matters before its courts and the concomitant need to facilitate open and evenhanded development of the facts underlying a dispute.

To recapitulate, the following are discoverable and admissible:

(1) accident reports;

(2) traffic counts; and,

(3) other raw data collected by the Department.

The following are not:

(1) surveys to identify hazardous railroad crossings and improve them (§ 130);

(2) applications for federal assistance in replacing or rehabilitating highway bridges (§ 144);

(3) studies assigning priorities and schedules of projects for highway improvement (§ 152); and,

(4) other compilations made for developing highway safety construction projects which would utilize Federal-aid funds (§ 409).

Plaintiffs Wiedman and Falcon argue that the discovery prohibition, added to § 409 in 1991, should not be applied retroactively to their cause of action which arose in 1989. A change in federal procedural law applies retroactively, absent a contrary legislative mandate or manifest injustice. *Bradley v. School Board of Richmond,* 415 U.S. 696, 711, 94 S.Ct. 2006, 2016, 40 L.Ed.2d 476, 488 (1974). Section 409 does not indicate that it was meant to apply only prospectively. Manifest injustice does not result since plaintiffs may access the underlying facts which might prove their claim.

CONCLUSION

For the foregoing reasons, the rulings of the trial court are vacated and the cases are remanded for further action in conformity with this opinion.

RULINGS VACATED AND CASES REMANDED.

SUPREME COURT OF LOUISIANA

NO. 93-CC-1314

ANTHONY R. WIEDEMAN, JR.

Versus

DIXIE ELECTRIC MEMBERSHIP CORPORATION, ET AL.

c/w 93-CC-1318

DERYL A. FALCON

Versus

DIXIE ELECTRIC MEMBERSHIP CORPORATION

c/w 93-CC-1352

ROGER CONNER AND MONA CONNER

Versus

LARRY W. LAIRD, ET AL.

ON WRIT OF REVIEW
TO THE COURTS OF APPEAL,
FIRST AND THIRD CIRCUITS,
STATE OF LOUISIANA

KIMBALL, Justice, concurring.

I concur in the opinion but write additionally to note that in my opinion, the majority's statement concerning the discoverability and admissibility of accident reports, traffic counts, and other raw data collected by the Department should be construed to refer only to the discoverability and admissibility of such information under 23 U.S.C. § 409.

APPENDIX B

Supreme Court
STATE OF LOUISIANA
New Orleans

Chief Justice
Pascal F. Calogero, Jr.
Associate Justices
Walter F. Marcus, Jr.
James L. Dennis
Jack Crozier Watson
Harry T. Lemmon
Pike Hall, Jr.
Catherine D. Kimball
Revius O. Ortique, Jr.
Clerk of Court
Frans J. Labranche, Jr.

301 Loyola Ave., 70112

Telephone 504-568-5707

January 6, 1994

Hon. Richard P. Ieyoub
Attorney General

Ronald A. Seale, Esq.
Special Assistant Attorney
SEALE, SMITH, ZUBER
& BARNETTE

Terry J. Manuel, Esq.
Special Assistant Attorney

Steven R. Giglio, Esq.
KLEINPETER,
SCHWARTZBERG &
STEVENS

Norman P. Foret, Esq
MCBRIDE FORET, ETAL.
Pat LeBlanc, Esq.
BERNARD, CASSISA, ETAL
Mark M. Dennis, Esq.
Attorney at Law

Jack Roethele, Esq.
FAYARD, HARRIS,
ROETHELE &
HONEYCUTT
Donna Adorna, Esq.
DEPARTMENT OF
HEALTH & HOSPITALS

Re: Anthony R. Wiedeman, Jr.
vs. Dixie Electric Membership. Corp.
No. 93-CC-1314 C/W 93-CC-1318
C/W 93-CC-1352

Dear Counsel:

Enclosed please find a News Release documenting this court's denial of the application for rehearing, in the above entitled referenced case.

This judgement is now final. By copy of this letter we are advising both the trial court and appellate court of the finality of this case and instructing them to do whatever is necessary to implement the judgment.

With kindest regards, I remain,

Very truly yours,
s/ Frans J. Labranche, Jr.
Clerk of Court

FJLJr:vrc
Enclosure
ccs: Hon. Stranley Lemoine, Clerk
Hon. Lucius W. Patterson, Clerk
Hon. Robert H. Morrison, III

SUPREME COURT OF LOUISIANA

FOR IMMEDIATE NEWS RELEASE

NEWS RELEASE #003

FROM: CLERK OF SUPREME COURT OF LOUISIANA

On the 6th day of January, 1994, the following action was taken by the Supreme Court of Louisiana in the case(s) listed below:

REHEARING GRANTED WITH ORDER:

93-C - 0493 THOMAS FUTCH V. COMMERCIAL UNION INSURANCE CO., ET AL
(Parish of Orleans)
See Per Curiam.
CALOGERO, C.J. - not on panel.
MARCUS, J. - would grant a rehearing.

REHEARINGS DENIED:

91-KA-0998 STATE OF LOUISIANA V. NATHANIEL ROBERT CODE, JR. (Parish of Caddo)
CALOGERO, C.J. – not on panel.

93-C-0445 BOBBIE J. RIDENOUR AND BRENDA RIDENOUR V. WAUSAU INSURANCE COMPANY AND SIDNEY WEBRE
(Parish of East Baton Rouge)
WATSON, J. – would grant a rehearing.
ORTIQUE, J. – not on panel.

93-C-0813 CARROLL LEBLANC, Wife of/and GERALD CONSTANCE AND CLEARY BICYCLE, MOPED & GO-CART CENTER, INC. V. STATE OF LOUISIANA, THROUGH THE

DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT, OFFICE OF HIGHWAYS, PEPPER & ASSOCIATES, INC. T.L. JAMES AND COMPANY, C.A.A. AND LOUISIANA PAVING, INC. (Parish of Jefferson)
WATSON, J. – not on panel.
ORTIQUE, J. – would grant a rehearing.

93-C-1276 — SCOTT YOUNT AND ROYCE YOUNT v. JOHN MAISANO, DR. JOSEPH V. MAISANO, INDIVIDUALLY AND ON BEHALF OF HIS MINOR SON, WILLIAM MAISANO AND WILLIAM MAISANO; BUELAH POMMELS, INDIVIDUALLY AND ON BEHALF OF HER MINOR SON, CHARLES POMMELS AND CHARLES POMMELS AND UNITED SERVICES AUTOMOBILE ASSOCIATION (Parish of Jefferson)
ORTIQUE, J. – not on panel.

93-CC-1314 C/W 93-CC-1318 — ANTHONY R. WIEDEMAN, JR. v. DIXIE ELECTRIC MEMBERSHIP CORPORATION, ET AL C/W DERYL A. FALCON v.DIXIE ELECTRIC MEMBERSHIP CORPORATION, ET AL (Parish of Livingston)

CW 93-CC-1352	ROGER CONNER AND MONA CONNER v. LARRY W. LAIRD, ET AL (Parish of Calcasieu) CALOGERO, C.J. – not no panel.
93-CA-1348	AMERICAN WASTE & POLLUTION CONTROL v. ST. MARTIN PARISH POLICE JURY, ET AL (Parish of St. Martin) WATSON, J. – not on panel. not on panel. HALL, J. – notes to grant.
93-C-1355 C/W 93-C-1459	JOHNNY STAPLETON, AND JUDY STAPLETON V. GREAT LAKES CHEMICAL CORPORATION, MAX HENDERSON, OLD REPUBLIC INSURANCE COMPANY, LOUISIANA INDEMNITY COMPANY, CHRISTINA RENAE BROWN, AND ALLSTATE INSURANCE COMPANY (Parish of Lincoln) KIMBALL, J. – not on panel.

APPENDIX C

Supreme Court
STATE OF LOUISIANA
New Orleans

Chief Justice
Pascal F. Calogero, Jr.
Associate Justices
Walter F. Marcus, Jr.
James L. Dennis
Jack Crozier Watson
Harry T. Lemmon
Pike Hall, Jr.
Catherine D. Kimball
Revius O. Ortique, Jr.

301 Loyola Ave., 70112

Telephone 504-568-5707

January 12, 1994

Clerk of Court
Frans J. Labranche, Jr.

Ronald Armbrust Seale Esq.
SEALE, SMITH, ZUBER &
BARNETT
8550 United Plaza Blvd.
Suite 200
Baton Rouge, LA 70809

Terry James Manuel Esq.
Attorney at Law
1020 Ryan St.
P.O. Box 3206
Lake Charles, LA 70602

In Re: Wiedeman, Anthony R., Jr.
vs. Dixie Electric Membership. Corp.
Nos. 93-CC-1314, 93-CC-1318 and
93-CC-1352

Dear Counsel:

This is to advise that the Court took the following action on the Motion To Stay Proceedings Pending Application to the U.S. Supreme Court filed in the above entitled matter:

"Stay order denied."

With kindest regards, I remain,

Very truly yours,
s/ Frans J. Labranche, Jr.
Clerk of Court

FJLJr/rtd
ccs: Steven R. Giglio Esq.
John Thomas Roethele Esq.
Donna Adorno Esp.
Norman P. Foret Esq.
Catherine Smith Nobile Esq.
Patricia S. LeBlanc, Esq.

Court of Appeal, First Circuit, Number CW93 0308, CW93 0300 21st Judicial District Court Div. "C" Number 65,508

APPENDIX D

Supreme Court of the United States
OFFICE OF THE CLERK
WASHINGTON, DC 20543

WILLIAM K. SUTER
CLERK OF COURT

AREA CODE 202
479-3011

January 22, 1994

Mr. Ronald Seale
Two United Plaza, Suite 200
8550 United Plaza Blvd
Baton Rouge, LA 70809

Re: Anthony R. Wiedeman, Jr.,
v. Dixie Electric Membership Corporation
Application No. A-592

Dear Mr. Seale:
The application for a stay of judgment pending the filing of a petition for certiorari in the above-entitled case has been presented to Justice Scalia, who on January 22, 1994 endorsed thereon the following:

"Denied
22/I/94
AS"

Sincerely,
WILLIAM K. SUTER, Clerk
s/ Cynthia Rapp
Assistant Clerk

NOTE - FOR YOUR INFORMATION: A copy of this letter has been sent to all interested parties shown on the attached notification list.

APPENDIX E

STATE OF LOUISIANA
COURT OF APPEAL, FIRST CIRCUIT

ANTHONY R. WIEDEMAN, JR. NO. 93 CW 0308
VERSUS
DIXIE ELECTRIC MEMBERSHIP
CORPORATION, ET AL

CONSOLIDATED WITH:

DERYL A. FALCON

VERSUS

DIXIE ELECTRIC MEMBERSHIP
CORPORATION, ET AL APR 23 1993

In re: Anthony R. Wiedeman, Jr. and Deryl A. Falcon applying for supervisory writs, 21st Judicial District Court, Parish of Livingston, No. 65508 - Division "C".

WRIT DENIED. This Court declines to exercise its supervisory jurisdiction. The criteria set forth in Herlitz Construction Company, Inc. v. Hotel Investors of New Iberia, Inc., 396 So.2d 878 (La. 1981), are not met.

VGW
WAE
LAS

COURT OF APPEAL, FIRST CIRCUIT

s/ Karen West
DEPUTY CLERK OF COURT FOR THE COURT

APPENDIX F

ANTHONY R. WIEDEMAN, JR.

VERSUS

DIXIE ELECTRIC MEMBERSHIP
CORPORATION, ET AL

: NUMBER 65, 408, DIVISION "C"
: 21ST JUDICIAL DISTRICT COURT
: PARISH OF LIVINGSTON
: STATE OF LOUISIANA

ORDER

This matter is before the Court on Motion to compel Responses to Discovery filed by plaintiff. Following a hearing, the Court took the matter under advisement, affording the litigants an opportunity to file supplementary memoranda.

Considering the testimony and other evidence in these proceedings, and for written reasons this day assigned:

IT IS ORDERED that Interrogatories Nos. 9 and 10 as propounded by plaintiff to the Department of Transportation and Development, and Request for Production No. 6 are privileged and need not be answered.

IT IS FURTHER ORDERED that the Department of Transportation and Development fully and completely answer all other interrogatories and respond to all of the requests for production within thirty (30) days from the date of this order.

In as much as the Court has upheld, in part, some of the

objections to discovery filed by the Department of Transportation and Development, no costs or attorney's fees will be assessed in this proceeding.

LIVINGSTON, LOUISIANA, this 2nd day of February 1993.

S/ ROBERT H. MORRISON III, JUDGE
21ST JUDICIAL DISTRICT COURT
DIVISION "C"

21st JUDICIAL DISTRICT
PARISH OF LIVINGSTON, LA
A TRUE COPY OF THE ORIGINAL
This February 3, 1993
s/ Lucius Patterson
Clerk of Court
s/ Brenda Day
Deputy Clerk

ANTHONY R. WIEDEMAN, JR.

VERSUS

DIXIE ELECTRIC MEMBERSHIP
CORPORATION, ET AL

: NUMBER 65, 408, DIVISION "C"
: 21ST JUDICIAL DISTRICT COURT
: PARISH OF LIVINGSTON
: STATE OF LOUISIANA

REASONS FOR JUDGMENT

This matter is before the Court on motions to compel responses to discovery in the form of interrogatories and requests for production. The suit is one for personal injuries in which plaintiffs contend that both the Louisiana Department of Transportation and Development ("DOTD") and another defendant are liable. The alleged basis of liability of the DOTD is the condition of the roadway at the time of the accident. A companion motion to compel as to the co-defendant has been otherwise disposed of. With respect to the objections to discovery filed by DOTD, the matter was taken under advisement with the opportunity for both sides to further brief the matter.

Basically, the DOTD has objected to discovery on the ground of 23 USC 409. This statute, as amended in 1991, reads as follows:

> Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled for the purpose of identifying evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to Sections

> 130, 144, and 152 of this title or for the purpose of development any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

Evidence was adduced at the hearing on the motion to compel. A witness for the DOTD testified that, while there were no immediate plans for any construction or improvement on the highway or intersection in question, that the DOTD was always looking for Federal funds, that the road or intersection might be improved in the future, and that, if such were the case, the DOTD would seek Federal funds, based in part on information compiled from prior accidents, etc.

Based on its contention of privilege under 23 USC 409, the DOTD has refused to answer interrogatories concerning daily traffic counts at the intersection, or the production of any accident reports, inspection reports, maintenance reports, specifications and design criteria for warning signs and traffic control devices, planned or pending changes in the specifications in design, copies of all claims or lawsuits involving motor accidents at the site, reports, written statements or other written tangible involving any accident at the site, documents or other evidence intended to be relied upon at trial, or work orders for review of traffic control devices at the intersection.

The issue of this claimed privilege has been dealt with by the Louisiana Courts, under the provisions of 23 USC 409 prior to amendments made to that statute in December of 1991. Prior to those amendments, the wording of the statute

was identical except that the statute said that such reports, surveys, etc., could not be admitted into evidence in a court proceeding. The 1991 amendment added a phrase making this information not subject to discovery *or* admitted into evidence.

The Louisiana Supreme Court, in Beecher v. Keel, No. 92-CC 2788, granted writs in that case, and held that the Trial Court must address the admissibility of each item of evidence as it is offered in accordance with the criteria of 23 USC § 409. The Court stated:

> If the Trial Court finds that the data were compiled pursuant to 23 USC § 152, "or for the purpose of developing any highway safety construction project which may be implemented utilizing Federal-aid highway funds," they shall not be admitted into evidence.

The First Circuit likewise dealt with the statute in the decision in *Martinolich v. Southern Pacific Transportation Company*, et al, 532 So.2d 435 (La. App. 1st Cir. 1988). This case held that while such evidence might not be admissible at trial, under Louisiana rules of discovery, if the information sought might lead to other discoverable evidence, the information was subject to discovery. The Court carefully considered the nature of privileges as ". . . the exceptions to and in derogation of the system by which we determine the truth, and cannot be lightly created or expansively construed."

Obviously, under the provisions of R.S. 9:2800, a litigant in a highway case must be able to prove that the DOTD had actual or constructive notice of a particular vice or defect causing the damage prior to the occurrence in order to recover. As a practical matter, if the DOTD is allowed to hide behind a veil of secrecy under the provisions of 23 USC 409

in all cases, regardless of whether there are any actual construction or improvement projects on the drawing boards, this burden of proof could likely be satisfied only under exceptional cases of good luck on the part of counsel obtaining other isolated fragments of evidence from other sources. This Court does not consider this to be the intent of 23 USC 409.

A practical reading of this statute dictates that construction must be limited to incidents of actual "reports, surveys, schedules, lists, or data compiled *for the purpose* of identifying, evaluating or planning the safety enhancement of accident sites" or for developing highway safety construction improvement projects. This is analogous to a work product privilege, or to the argument that evidence of subsequent remedial measures should not be admissible in products liability cases because of a potential chilling effect on research and development to make products safer. The highway department should not be penalized for trying to develop plans to improve a highway by having those plans turned against it in litigation. However, as is apparently the case in the present situation, there are no specific plans for any improvement or reconstruction of this highway or intersection. Any report or accident lists may conceivably at some point in the future be used for an eventual plan for reconstruction or improvement, but, absent evidence that they were specifically being compiled for that purpose, this Court cannot find that they should be extended the privilege provided by 23 USC 409.

In examining the specific interrogatories and requests for production, the Court notes that Interrogatories Nos. 9 and 10 ask for a listing of location and dates of modifications or removal of island structures at T-intersections for specified highway types performed by the DOTD. The Court will hold

that this information is protected under the Federal statute and need not be responded to.

Likewise, Request for Production No. 6 asks for planned or pending changes in the specifications and design criteria relative to Requests 3 and 4. The Court hold that this matter is privileged, under the Federal statute, and no response need be made.

All other interrogatories and requests are ordered answered as being non-privileged.

Livingston, Louisiana, this 2nd day of February, 1993.

S/ ROBERT H. MORRISON, III, JUDGE
21ST JUDICIAL DISTRICT COURT
DIVISION "C"

21st JUDICIAL DISTRICT
PARISH OF LIVINGSTON, LA
A TRUE COPY OF THE ORIGINAL
this February 3, 1993
s/ Lucius Patterson
Clerk of Court
s/ Brenda Day
Deputy Clerk

Supreme Court, U.S.
FILED
APR 28 1994
OFFICE OF THE CLERK

No. 93-1565

THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1993

STATE OF LOUISIANA
DEPARTMENT OF TRANSPORTATION
AND DEVELOPMENT

PETITIONER

VERSUS

ANTHONY R. WIEDEMAN, JR.

RESPONDENT

DERYL A. FALCON

RESPONDENT

ROGER AND MONA CONNER [SIC]
DIXIE ELECTRIC MEMBERSHIP CORPORATION
MARK A. COSTON
ALLSTATE INSURANCE COMPANY
CANANDAIGUA WINE COOLER COMPANY, INC. [SIC]

RESPONDENT'S BRIEF IN OPPOSITION

STEVEN R. GIGLIO
Attorney for Anthony R. Wiedeman, Jr.
and Deryl A. Falcon, Respondents
2363 Hollydale Ave., Suite B
Baton Rouge, LA 70808
Telephone: (504) 346-1818

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

SUMMARY OF THE ARGUMENT 1

REASONS FOR DENYING CERTIORARI 2
THE DECISION BELOW IS INTERLOCUTORY 2
THE FACTUAL RECORD IS INCOMPLETE 2
THE CONFLICTING DECISIONS ARE DISTINGUISHABLE ON THE LAW 3
THE ISSUES PRESENTED ARE NOT FULLY DEVELOPED 4
THE DECISION BELOW IS CORRECT 4

CONCLUSION 16

TABLE OF AUTHORITIES

Page

CASES

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 502-503 2

Harrison v. Burlington Northern Railroad Company, 965 F.2d 155, 156 (7th Cir. 1992) 11

Light v. State, 560 N.Y.S.2d 962 (St. Cl. 1990) 12

Lloyd v. Cessna Aircraft Co., 74 F.R.D. 518 (E.D. Tenn 1977) . .13

Martinolich v. Southern Pacific Transportation, 532 So.2d 435 (La. App. 1st Cir. 1988); writ denied, 535 So.2d 745 (U.S. Cert. denied, June 12, 1989, 88-1856) 10

Perkins v. Ohio Department of Transportation, 584 N.E.2d 794(Oh.App. 10th Dist. 1989) 3

Robertson v. Union Pacific Railroad Company, 954 F.2d 1933 (8th Cir. 1992) 11

Southern Pacific Transportation Company v. Yarnell,176 Az. 552, 863 P.2d 271, 274 (Ariz. App.Div. 1 1993) (Review granted) 4

Taylor v. St. Louis Southwestern Ry. Co., 746 F.Supp 50, 54 (D.Kan. 1990) 4

STATUTES AND OTHER AUTHORITIES

Page

23 U.S.C. § 409 4

23 U.S.C. §§ 130, 144 and 152 3

47 Columbia L.Rev. 527 (1947). 7

51 George Washington L.Rev. 551, 573, 575. 13

96 Harv.L.Rev. 1083, 1090 (1983) 12

SUMMARY OF THE ARGUMENT

The decision below is interlocutory. It does not seriously erode federal policy, and Petitioner has not shown that it should be treated as a final judgment.

The factual record is incomplete since Petitioner's witness was not examined in depth concerning all of the record keeping requirements of 23 U.S.C. § 152, nor at all about 23 U.S.C. §§ 130 and 144. Also, Petitioner's factual assertion that it has no other reason to receive information save the requirements of Title 23 is beyond the scope of the decision below and not of record.

The conflicting decisions cited by Petitioner are distinguishable on the law as arising out of railway-highway crossing accidents whose relevant record keeping requirements arise in part out of 23 U.S.C. § 130 not 23 U.S.C. § 152 as does the decision herein.

The issues presented are not fully developed in the case law. With only two Federal Appellate Circuits contributing decisions and only three state courts of highest appeal contributing decisions, Petitioner has not shown that the issues are adequately developed for decision by certiorari.

The decision below is correct. The Louisiana Supreme Court finds that 23 U.S.C. § 409 preempts state law. It recognizes that Section 409 creates a privilege, and rules that certain of Petitioner's records compiled pursuant to 23 U.S.C. § 152 are not subject to discovery and are inadmissible. The decision acknowledges as correct that the universally accepted reason for enacting Section 409 was to facilitate candor. This federal policy is faithfully enforced by this decision.

The decision as to what is included/excluded from Section

409's protective field is multi-faceted. This decision recognizes the steps in the analysis and reaches a just conclusion for the documents under consideration herein.

Petitioner does not show that the decision is flawed, or that it substantively thwarts the federal government's policy of facilitating candor.

REASONS FOR DENYING CERTIORARI

THE DECISION BELOW IS INTERLOCUTORY

The decision of the Louisiana Supreme Court, sub judice, relates to discovery issues: written interrogatories and request for production of documents, and was interlocutory[1]. This decision has yet to be applied by the trial court herein to determine admissibility of evidence at trial on the merits, and there have been no reported appellate court cases applying this decision of the Louisiana Supreme Court. Although the Louisiana Supreme Court's analysis is thorough, the Louisiana Supreme Court, in fact, was called upon by the record only to discuss a few specific pieces of written evidence such as uniform motor vehicle accident reports and daily traffic counts. Petitioner possesses many types of written information that were not discussed by the Court, and which ultimately may or may not be held to be discoverable/admissible evidence.

THE FACTUAL RECORD IS INCOMPLETE

Petitioner writes that the decision sub judice "is particularly egregious when Louisiana's Department of Transportation and Development has no other reason to receive and compile such

---

[1] Denial of certiorari will not seriously erode federal policy. infra. The decision, sub judice, does not appear to meet the criteria set forth in Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 502-503, for reviewing interlocutory rulings.

information other than for the purposes of compliance with Title 23." Only Sections 152, 144 and 130 are relevant to the record keeping inquiry, not the entirety of Title 23.

Evidence was received by the trial court herein at the hearing to compel production of evidence. The witness produced by Petitioner was examined about the purposes of receiving certain types of information; however, there are many types of information which were not discussed. In particular, no mention was made in this record of information gathered pursuant to 23 U.S.C. §§ 130 and 144.

Petitioner's statement that the ruling sub judice is particularly egregious when there is no other reason to receive the information outside of compliance with Title 23 is not well explored in the record, and is a misstatement of the principal inquiry. infra.

THE CONFLICTING DECISIONS ARE DISTINGUISHABLE ON THE LAW

Petitioner complains that the interpretation of 23 U.S.C. § 409 has not been uniform, and cites the needs of railroads for uniformity; however, the case sub judice does not involve a railway-highway crossing claim, nor documents generated pursuant to 23 U.S.C. § 130.

The decisions cited by Petitioner, except Perkins v. Ohio Department of Transportation, 584 N.E.2d 794 (Oh. App. 10th Dist. 1989), deal exclusively with the application of 23 U.S.C. Section 409 to Section 130, railway-highway crossings; however, the Louisiana Supreme Court decision, sub judice, is a Section 152 highway hazard case.

The documents generated for these three different Sections of Title 23 vary with the record keeping requirements in each of the three sections.

Based upon Petitioner's cited cases and its argument, a railway-

highway case appears to be a better vehicle for interpretation of Section 409 than an automobile case such as presented herein.

THE ISSUES PRESENTED ARE NOT FULLY DEVELOPED

Since its enactment and subsequent amendment 23 U.S.C. § 409 has been subject to review by the highest court in only three (3) states and in only two (2) United States Circuit Courts of Appeal. In one decision cited by Petitioner, Southern Pacific Transportation Company v. Yarnell, 176 Az.552, 863, P.2d 271 (Ariz. App. Div. 1 1993), the Arizona Supreme Court has granted review.

Furthermore, even the cases which endeavor to articulate the proper analysis for determining whether a document is covered by Section 409 inevitably leave something out[2].

THE DECISION BELOW IS CORRECT

Section 409 protects information of an enumerated type:

1) Reports, surveys, schedules, lists and data compiled;

for either of two enumerated purposes:

A) Identifying, evaluating or planning the safety enhancement of potential accident sites or railway-highway crossings pursuant to Section 152, 144 or 130; or

B) Developing any highway safety construction improvement project which may be implemented using Federal-aid highway

---

[2]In Taylor v. St. Louis Southwestern Ry. Co., 746 F.Supp 50, 54 (D.Kan. 1990), the court omitted a step in the analysis, the requirement that the compilation "mention or address" the accident location sued upon.

funds;

and under the overall condition that:

2) The enumerated reports, surveys, schedules, lists or data must mention or address the accident location sued upon.

Purpose (B) from the outline above lists one of the purposes for which the enumerated documents are compiled, and is, in part, determinative of whether a report, etc., is protected by Section 409. It requires that the report, etc., be for developing any highway safety construction improvement project eligible for federal highway funds.

Petitioner engages in many types of construction projects which are not, per se, safety improvements such as maintenance, relocations and rehabilitations, etc. Information such as average daily traffic counts is certainly used to project when a highway will need maintenance, relocation, etc., and is not necessarily exclusively used for safety improvements, although that may be one of its uses. A uniform motor vehicle accident report in Louisiana contains, inter alia, information on damage to Petitioner's property arising from the accident, defects in roadway conditions or controls and other types of information which are used by Petitioner for maintenance, rehabilitations, etc., and not exclusively for safety improvements.

The question naturally arises whether information which is compiled for a purpose listed in Section 409 and for unlisted purpose(s) is or is not protected by Section 409.

Purpose (B) from the outline above shows that this alternative purpose does not incorporate any of the activities found in the first purpose outlined in Purpose (A) above.

Purpose (A) in the outline calls for identifying, evaluating or planning a safety enhancement pursuant to one of three Sections of Title 23; however, purpose (B) lists only one: developing any safety

construction improvement project eligible for federal funds.

Image how the meaning would change if Purpose (B) incorporated the activities of Purpose (A). The new purpose would read as follows:

> (B) **Identifying, evaluating or planning** any highway safety enhancement of potential accident sites....

Congress has expressed clearly its intent to list alternate purposes, each with its own range of covered activities. Purpose (B) seems to be a backstop, or a sort of safety net for the main and first listed purpose.

Purpose (A) is very specific as to which documents are included referring to specific Sections of Title 23 for their meaning; however, the range of activities is broader, including "identifying, evaluating or planning" safety enhancements. Purpose (B) does not refer to Sections 152, 130 or 144; however, it requires that the documents be compiled to develop a project. Purpose (B) is very narrow since it requires the existence of such a project. "Develop a project" surely means making manifest a plan of action.

Turning to the question of exclusivity, Congress did not intend to protect reports, surveys, schedules, lists or data which are compiled for non-listed purposes.

> "One more caution is relevant when one is admonished to listen attentively to what a statute says. One must also listen attentively to what it does not say." "But, as we have said the usage of Congress simply shows that it has spoken with careful precision, that its words mark the exact spot at which it stops." (citations

omitted)[3]

One way that Congress could have expressed an intent to protect reports, etc. compiled for any purpose including a listed purpose is for Congress to have said that these are non-exclusive purposes.

Congress could have said, reports, surveys, schedules, lists or data compiled for the purpose of (A) or (B) regardless of any other purpose or use are protected, but it did not. Congress has stopped well short of saying such. (Congress said that the protected writings could not be discovered or admitted into evidence or used for any other purpose, which could include impeachment, rebuttal, etc.)

In further analysis of purpose (A), the terms used in Section 409 "report, survey, schedule, lists and data" are repeated throughout the record keeping requirements of Sections 130, 144 and 152; therefore, Purpose (A) refers to only those enumerated and identified reports, surveys etc. "provided" for in Sections 130, 144 and 152.

The trial court's analysis of Section 409 in Taylor v. St. Louis Southwestern Ry. Co., 746 F.Supp. 50, 54 (D. Kan. 1990) is close to being a correct analysis, supra, and we find this outline therein:

> "For purposes of defendant's motion, Section 409 makes inadmissible: (1) reports, surveys, schedules, lists or data, (2) compiled for the purpose of identifying, evaluating or planning the safety enhancement of potential accident sites or railway-highway crossings, (3) pursuant to Section 130 of Title 23 (providing, among other things, for state surveys of railway-highway crossings and federal funding for protective devices) or (4) for the purpose of developing any highway safety construction

---

[3] 47 Columbia L.Rev. 527, 536.

improvement project which may be implemented using Federal-aid highway funds. (emphasis supplied)

Emphasis is given to the above quoted parenthetical matter because this case recognizes that Congress intended a multi-step analysis before including a document within the protective field of Section 409. If a report, survey, schedule, list or data is compiled pursuant to Section 130, one need look at Section 130 for understanding of the record keeping requirements of that Section and to determine whether the report, etc. was generated "pursuant" to that Section. By themselves the words reports, surveys, schedules, lists and data have no meaning save in the context of the multi-step analysis set forth by Congress in Section 409. Since Section 130 requires states to survey railway-highway crossings, then any survey which mentions or addresses the accident location sued upon and is compiled for the purposes listed is within the protective field of Section 409.

Congress requires that the reports, surveys, schedules, lists and data "be complied for the purpose of", and thereafter listed only three Sections of Title 23. Clearly omitted by Congress are the regulations promulgated under Title 23 along with any other Section in Title 23 including all of Chapter 4.

Had Congress intended to include the regulations promulgated under Sections 130, 144 and 152 in its protective field then it would have indicated such an intention by employing language such as **"and the regulations promulgated thereunder"**. Absent such language these regulations can not be included in the reach of Section 409.

The phrase "compiled for the purpose of" also modifies "highway safety construction improvement project", which is also self-limiting and does not, therefore, include other types of construction projects such as relocations, rehabilitations, maintenance, etc. Unless the writing was generated exclusively for the purpose of developing such a safety improvement project, then Section 409 does not apply. supra.

Petitioner's witness testified that there was no current project or plan to improve the intersection where this accident occurred; therefore, Petitioner could not have generated any of the requested documents for the purpose of "developing" a safety improvement project.

The final modifying phrase of Section 409 requires that the enumerated document mention or address the accident location. Any writing which may be otherwise appropriate for protection pursuant to Section 409 and which does not mention or address the location of the accident sued upon, does not qualify for protection under Section 409. The final sentence of Section 409 requires that a report, survey, schedule, list or data mention or address the accident location as a condition of inclusion into the protective field of Section 409. This final condition of Section 409 assumes the existence of an assemblage of information in order for there to be an address or mention of an accident location. This final condition further negates Petitioner's argument for an expansive reading of the term data. This final condition assumes that any compiled data will address or mention a specific accident location in a self-critical way. If the self-critical analysis is part of the record keeping requirements of Sections 152, 144 or 130, then the document is protected. If the document is compiled for developing a safety improvement construction project utilizing federal funds then it is also protected.

The statute makes no mention whatsoever of deposition or trial testimony of the authors of protected writings. Cited cases to the contrary aside, one does not "duck", infra. Section 409 by permitting discovery depositions and trial testimony of persons who can be examined outside the use of protected documents.

Petitioner's cited cases lack any analysis of why or how Congress could have intended to limit the testimony of experts. This erroneous holding is merely another step in the faulty analysis leading to the erroneous conclusion that Congress intended to exclude documents compiled for an enumerated purpose regardless whether or not the documents were also compiled for an unlisted purpose.

Both are erroneous holdings arising from reading too much into Section 409. Section 409 does not exclude expert testimony and it does not exclude information compiled for unlisted purposes, even if it is also compiled for a listed purpose.

Petitioner argues on page nine (9) that the Louisiana Supreme Court "eviscerated" the privilege created by Section 409; however, the Louisiana Supreme Court reversed a prior Louisiana case, Martinolich v. Southern Pacific Transportation, 532 So.2d 435 (La. App. 1st Cir. 1988); writ denied, 535 So.2d 745 (1988), (U.S. Cert. denied, June 12, 1989, 88-1856) which had held that Section 409 did not create a privilege, and now it holds that Section 409 does create a privilege.

The decisions cited by Petitioner, including the decision, sub judice, uniformly hold that Section 409 preempts state procedural laws in conflict therewith.

Petitioner writes at page seven (7) that Section 409 "has a significant impact on civil litigation in state as well as federal tribunals". For the most part, however, the substantive law to be applied in the civil litigation referred to by Petitioner is state substantive law whether it is applied by a state court or a federal court applying state law under the Erie Doctrine.

Petitioner writes at page ten (10), that the decision sub judice "completely thwarts the intent of Section 409 in particular and, to a great degree, the purposes of Title 23 in its entirety."

Petitioner fails to provide an analysis of the intent of Congress in enacting Section 409 other than illustrating the minor variations in interpretation under Section 130 railway-highway crossing cases. Since the case, sub judice, is a Section 152 case, Petitioner's factual illustrations are not wholly applicable.

Petitioner quotes at length from and relies on Southern Pacific Transportation Company v. Yarnell, 176 Az. 552, 863 P. 2d 271 (Ariz. App. Div. 1 1993), which is a decision of an intermediate appellate

court, but fails to advise this Honorable Court that the Supreme Court of Arizona has granted review. Oral argument is set therein for May 5, 1994.

Ultimately, Petitioner does not show that the decision of the Louisiana Supreme Court "completely thwarts the intent" of Congress in enacting Section 409; likewise, Petitioner is unable to show that the "Louisiana Court effectively eviscerates Section 409".

Section 409 has an aim, as does every statute.

> "Legislation has an aim; it seeks to obviate some mischief, to supply an inadequacy, to effect a change of policy, to formulate a plan of government. That aim, that policy is not drawn, like nitrogen, out of the air; it is evinced in the language of the statute, as read in the light of other external manifestations of purpose."[4]

Petitioner's cited cases state that Section 409 was enacted to facilitate candor. Harrison v. Burlington Northern Railroad Company, 965 F.2d 155, 156 (7th Cir. 1992), Robertson v. Union Pacific Railroad Company, 954 F.2d 1933 (8th Cir. 1992), Southern Pacific Transportation Company v. Yarnell, 863 P.2d 271, 274 (Ariz. App.Div. 1 1993) (Review granted).

These cases also say that the Congressional language is broad. The lower court in Harrison is quoted as saying that it could not "duck the statute" by permitting cross examination of the author of an excluded report because his testimony would have "circumvented the purposes of the statute". Harrison p. 160.

In contrast to the decisions cited by Petitioner the trial court in Light v. State, 560 N.Y.S.2d 962, 965 (Ct. Cl. 1990) writes,

---

[4] 47 Columbia L.Rev. 527, 539(1947).

> "the goal of assuring candor is not necessarily synonymous with an intent to deprive the plaintiffs' bar of all access to relevant highway safety information. * * * it does not, expressly or by implication, make the information contained in such reports confidential."

Candor as a motivation in creating a privilege is discussed in the field of Self-Critical Opinions, which is a privilege applied in Federal Courts in certain limited circumstances.

Claims of privilege of Self-Critical Opinions in Federal Courts meet the following analysis:

1. information sought must result from critical self-analysis undertaken by the party seeking protection;

2. strong public interest must exist favoring the free flow of the type of information sought;

3. information sought must be of the type, release of which, would chill other disclosures[5].

In the application of this privilege clear distinction is drawn between subjective and objective information,

> "Courts have seemed to assume that all factual portions of self-analyses fall outside the privileges's rationale[6].

All statements of fact are discoverable, only evaluative or subjective impressions are protected, and if the information is mixed,

---

[5]96 Harv.L.Rev. 1083, 1090 (1983).

[6]Ibid, p. 1094.

then in camera inspections are employed to edit the material[7].

Also, non-documentary discovery is permitted, such as deposition discovery of the person making the protected report[8].

There is also provision for exceptional need, which is a "standard doctrine surrounding the privilege of self-critical analysis".[9]

Consistent with the conclusion reached by the court in Light, supra that candor is not synonymous with an intent to deprive the plaintiffs' bar of access to probative information, the privilege of Self-Critical Opinion, which is a candor privilege,[10] does not deprive litigants of underlying facts or testamentary evidence. It does not seem necessary or desirable to read § 409 in a way that deprives litigants of more than those documents clearly set forth by Congress, and under the conditions clearly set forth for each document. These documents are compiled for the record keeping requirements of Sections 152, 144 and 130, or compiled for developing (implying active consideration) a safety construction improvement project eligible for federal funding.

Petitioner's arguments below sought to imbue Section 409 with the mantle of an immunity statute. Given the absence of Congressional discussion it is highly improbable that Congress intended to provide any

---

[7] Ibid.

[8] Lloyd v. Cessna Aircraft Co., 74 F.R.D. 518 (E.D. Tenn 1977).

[9] 96 Harv.L.Rev. 1083, 1099 (1983).

[10] Some students of this "privilege" describe it as "akin to the work-product rule" which is a qualified immunity not a privilege. 51 George Washington L.Rev. 551, 573, 575.

tort protection to Petitioner by enactment of Section 409.[11]

Section 409 is a foil created by Congress not to disarm claimants, but to right some perceived disadvantage created by the record keeping requirements of Sections 152, 144 and 130. The record keeping requirements of Sections 152, 144 and 130 can not be divorced from the meaning of "reports, schedules, surveys, lists and data" of Section 409.

Petitioner is clearly wrong to aggregate Section 409 with all of Title 23 when it writes that the decision herein "completely thwarts the intent of Section 409 in particular, and to a great degree, the purposes of Title 23 in its entirety". Section 409 does not embrace all of Title 23. The aim and policy of Section 409 is vastly different from the aim and policy of Title 23.

Congress has spoken with precision in explaining what it intends to withhold. Congress would not use a meat cleaver to accomplish that which could be done with a scalpel. The decision herein acknowledges the generally recognized Congressional motive for enacting Section 409, and as Congress intended, withholds from claimants that which is clearly identified by Congress to be necessary to correct the perceived disadvantage created by Congress' record keeping requirements of Sections 130, 144 and 152.

---

[11] "In a brief filed in Lafayette state district court, Asst. Atty. Gen. Carey Raughman Holliday warns that counsel for the DOTD "is recommending that the department refuse to accept the $3.5 million in federal funds and to shut down the railroad crossing upgrade program." * * * Holliday said in an interview that turning down the railroad improvement money is only under discussion. But he said consideration of shutting down the program and wiping out the computer data base is a possibility. * * *" **It would be cheaper to let people die than upgrade the system**," Holliday remarked.'" Sunday Advocate, Baton Rouge, La., April 24, 1994. (Emphasis added)

It seems fair, as the Louisiana Supreme Court did, to take into consideration the traditional function of pre-trial discovery and access to courts normally given tort claimants when undertaking an analysis of this statute.

> "The meaning of a statute is to be looked for, not in any single section, but in all the parts together and in their relation to the end in view."[12]

Had Congress intended a broad meaning for the terms report, survey, schedule, list and data, there is every reason to believe it simply could have used broad language such as "any and all documents or writings". Furthermore, an expansive reading of these terms serves to fulfill Petitioner's expectations as argued above that Section 409 is a tort reform measure, despite the complete absence of discussion in any reported decision that tort reform was a possible intent.

With the modifiers and limiters Congress designed into Section 409 it is difficult to conceive of this statute as "broadly" written, or severely restricting access to information.

The decision by the Louisiana Supreme Court is correct and it contains a fair and faithful analysis of the intention of Congress in enacting Section 409. The decision, sub judice, does no violence whatso-ever to 23 U.S.C. § 409. The different results cited by Petitioner, in part, may be attributed to differences in the types of cases and types of documents under decision. The decision herein fairly interprets and applies Section 409 in a highway hazard setting. Any differences between the treatment below and other decisions cited by Petitioner are not substantial enough to warrant review and a decision by this Honorable Court.

CONCLUSION

---

[12] 47 Columbia L.Rev. 527, 538 (1947).

The Louisiana Supreme Court has upheld 23 U.S.C. § 409; has held that it preempts state law; and has held, within the confines of this controversy, that certain documents are privileged from discovery and use in Court.

Petitioner greatly exaggerates the perceived harm caused by Louisiana's interpretation of this statute.

Petitioner has not shown that the minor variations found in the few decisions interpreting this statute raise a substantial federal question.

The federal policy involved is found in Section 409, not the entirety of Tittle 23 as argued by Petitioner.

Section 409's policy is to facilitate candor. This is a much narrower and very different policy from that of Title 23. The Louisiana Supreme Court's decision clearly upholds this policy of encouraging candor. Petitioner is unable to show and did not show that the decision seriously erodes the generally recognized policy of encouraging candor. Since the decision is interlocutory, Petitioner has not shown that the decision is reviewable.

The decisions, save one, relied on by Petitioner are railway-highway crossing cases which involve the record keeping requirements of Section 130 while the case herein involves the record keeping provisions of Section 152, making Petitioner's legal arguments distinguishable from the legal issues herein.

In addition, very few decisions have interpreted Section 409 and Petitioner has not shown that there has been sufficient analysis of this statute to justify decision by certiorari.

And, finally, the decision by the Louisiana Supreme Court is correct.

Petitioner's requested relief should be denied.

Respectfully submitted,

Steven R. Giglio
Bar Roll No. 6159
Attorney for Anthony R. Wiedeman Jr.
and Deryl A. Falcon
2363 Hollydale Avenue, Suite B
Baton Rouge, LA 70808
Telephone: (504) 346-1818